

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
CARIBBEAN MMDS PARTNERSHIP)	
)	
Motion to Cancel or Declare Forfeiture of License)	File No. 50244-CM-L-94
of Multichannel Multipoint Distribution Service)	
Station WNTK992, San German, Puerto Rico)	
)	
Application for Modification of License of)	File No. 50870-CM-P-97
Multichannel Multipoint Distribution Service)	
Station WNTK992, San German, Puerto Rico)	
)	
Application for Renewal of License of)	File No. BRMD-20010430AAA
Multichannel Multipoint Distribution Service)	
Station WNTK992, San German, Puerto Rico)	
)	
GRAND WIRELESS COMPANY, INC.)	File Nos. BMDP-19980721ND, BMDP-
)	19980721NE, and BMDP-19980721NF
Petition to Dismiss or Deny Applications for a)	
New Multichannel Multipoint Distribution Service)	
Station on the H Channels at San German, Puerto)	
Rico)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 2003

Released: November 13, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address Grand Wireless Company's (GWC's) Motion to Cancel or Declare Forfeiture of License¹ as well as its Petition to Deny,² both regarding Caribbean MMDS Partnership's (Caribbean's) Multichannel Multipoint Distribution Service (MMDS) Station WNTK992, San German, Puerto Rico. We also address Caribbean's Petition to Dismiss or Deny³ directed at GWC's applications for a new MMDS station on the H channels at San German, Puerto Rico.⁴ In addition, we address applications filed by Caribbean for modification of the facilities for

¹ Motion to Cancel or Declare Forfeiture of License (filed May 5, 1997) (Forfeiture Motion).

² Petition to Deny (filed Oct. 24, 1997).

³ Petition to Dismiss or Deny (filed Sep. 17, 1998).

⁴ File Nos. BMDP-980721ND, BMDP-980721NE, and BMDP-980721NF (filed July 21, 1998).

Station WNTK992⁵ and for a renewal of the license for the latter station.⁶ Finally, we address a request filed by Caribbean⁷ for waiver of a Section 21.303(d) of the Commission's Rules regarding requirements for discontinuance, reduction or impairment of service.⁸ For the reasons stated below, we grant GWC's Forfeiture Motions, deny Caribbean's Waiver Request, dismiss Caribbean's modification and renewal applications, and dismiss both GWC's Petition to Deny and Caribbean's Petition to Dismiss or Deny.

II. BACKGROUND

2. On June 22, 1993, the Commission granted a modified conditional license to Caribbean for MMDS Station WNTK992, San German, Puerto Rico. According to the terms of the license, Caribbean was required to complete construction of the station on or before December 22, 1993.⁹ Caribbean fulfilled this requirement.¹⁰ Caribbean states that it leases its channel capacity to Caribbean Wireless Systems, Inc. (CWSI).¹¹ On May 20, 1997, Caribbean reported the following:

While CWSI is in the process of obtaining a critical mass of channels necessary for its system, it would be impractical for Caribbean to provide commercial programming on the Station. Thus, Caribbean has been operating the Station with various test signals consisting of, among other things, recorded video programming and a character generator.¹²

3. On August 16, 1996, the Commission issued to GWC the Basic Trading Area (BTA) authorization for Mayaguez, Puerto Rico (BTA489).¹³ On March 13, 1997, Caribbean filed a notification of involuntary discontinuance of service for Station WNTK992, indicating that it would soon discontinue service for approximately thirty days.¹⁴ GWC filed the instant Forfeiture Motion on May 5, 1997. On May 20, 1997, the same date that Caribbean filed its opposition to GWC's motion,¹⁵ Caribbean also filed applications to modify its authorization for Station WNTK992 to decrease antenna centerline height.¹⁶

⁵ File No. 50870-CM-P-97 (filed Aug. 21, 1997).

⁶ File No. BRMD-20010430AAA (filed Apr. 30, 2001). *See Public Notice*, Report No. 424 (rel. July 3, 2001).

⁷ Letter from Leo H. Thomasian, Managing Partner, Caribbean MMDS Partnership, to Magalie Salas, Secretary, Federal Communications Commission (dated Sep. 14, 1999, filed Oct. 15, 1999) (Waiver Request). Caribbean indicates that it originally sent the Waiver Request on September 14, 1999 to the Washington, D.C. address of the Commission prior to its current location, but Caribbean never received confirmation that the Commission had received the original letter. *Id.*

⁸ 47 C.F.R. § 21.303(d).

⁹ *See* Conditional License for Station WNTK992.

¹⁰ Caribbean MMDS Partnership Certification of Completion of Construction (filed Dec. 27, 1993).

¹¹ Caribbean Opposition to Motion to Cancel or Declare Forfeiture of License (filed May 20, 1997) (Caribbean Opposition) at 8.

¹² *Id.* at 9.

¹³ *Public Notice: FCC Announces Grant of MDS Authorizations*, Report No. D-871 (rel. Aug. 16, 1996).

¹⁴ Notification of Involuntary Discontinuance of Service (filed Mar. 13, 1997).

¹⁵ Caribbean Opposition, *see supra*, note 10.

¹⁶ File Nos. 50670-CM-P-97, 50671-CM-P-97, 50672-CM-P-97 (filed May 20, 1997); *see* Mass Media Bureau Multipoint Distribution Service Applications, *Public Notice*, Report No. D-931 (rel. June 4, 1997).

These applications were granted on July 1, 1997.¹⁷ Caribbean filed a further modification application on August 21, 1997, to return the antenna centerline height to its previous level.¹⁸ GWC filed the instant Petition to Deny against this application for further modification on October 24, 1997.¹⁹ On July 21, 1998, GWC filed its applications for a new MMDS station on the H channels at San German, Puerto Rico.²⁰ The applications were placed on public notice on August 19, 1998.²¹ Caribbean filed its petition to deny these applications on September 17, 1998.²²

4. On October 5, 1998, Caribbean informed the Commission that, beginning on September 21, 1998 and continuing thereafter, Station WNTK992 had involuntarily discontinued service because of damage to its transmitting tower caused by Hurricane Georges.²³ Caribbean's annual reports for 1998 and 1999 reflect that Station WNTK992 was not in service starting on September 21, 1998 through and including December 31, 1999.²⁴ On October 15, 1999, Caribbean filed a request for a waiver of Section 21.303(d) of the Commission's Rules²⁵ to allow Station WNTK992 to remain off the air for an additional six months.²⁶

III. DISCUSSION

5. GWC maintains that since Station WNTK992 was unconstructed and inoperable for more than thirty days, Caribbean's license for the station was automatically forfeited pursuant to Section 21.44(a)(3) of the Commission's Rules.²⁷ GWC describes both engineering tests and site visits to where the transmit site of Station WNTK992 should be located,²⁸ which, GWC maintains, show no evidence of construction at the station's authorized site.²⁹ Moreover, GWC notes that Caribbean's annual reports for the years 1995 and 1996 show that Caribbean serves only a single subscriber, providing "other services"

¹⁷ *Public Notice*, Report No. D-935-A (rel. July 2, 1997).

¹⁸ Caribbean also filed a renewal application for WNTK992 on April 30, 2001 (File No. 20010430AAA). See Mass Media Bureau Instructional Television Fixed Service/Multipoint Distribution Service Actions, *Public Notice*, Report No. 424 (rel. July 3, 2001).

¹⁹ Petition to Deny (filed Oct. 24, 1997).

²⁰ File Nos. BMDP-980721ND, BMDP-980721NE, and BMDP-980721NF (filed July 21, 1998).

²¹ Mass Media Bureau Multipoint Distribution Service Applications, *Public Notice*, Report No.D-1000 (rel. Aug. 19, 1998).

²² Petition to Dismiss or Deny (filed Sept. 17, 1998).

²³ Letter from Leo H. Thomasian, Managing Partner, Caribbean MMDS Partnership, to Magalie Salas, Secretary, Federal Communications Commission (filed Oct. 5, 1998).

²⁴ Section 21.911 Annual Reports for Station WNTK992 for 1998 and 1999 (filed Mar. 1, 1999 and Apr. 18, 2000).

²⁵ 47 C.F.R. § 21.303(d).

²⁶ Letter from Leo H. Thomasian, Managing Partner, Caribbean MMDS Partnership to Magalie Salas, Secretary, Federal Communications Commission (dated Sep. 14, 1999, filed Oct. 15, 1999). Caribbean indicates that it originally sent this letter to the Commission's prior address on Sept. 14, 1999, but it never received confirmation of Commission receipt of this letter. *Id.*

²⁷ Motion for Forfeiture at 3. 47 C.F.R. § 21.44(a)(3) states that automatic forfeiture of a license will occur without notice to the licensee when there is a "voluntary removal or alteration of the facilities, so as to render the station not operational for a period of 30 days or more."

²⁸ *Id.*

²⁹ *Id.*

than entertainment, education, training, public service, or data, casting serious doubt upon whether the Station was in fact in operation.³⁰ GWC also maintains that that because Caribbean did not provide service within the twelve month period after Caribbean indicated that its station was constructed, Caribbean's license was required to be submitted for cancellation pursuant to Section 21.303(d) of the Commission's Rules.³¹

6. Caribbean claims that GWC's assertions cannot be relied upon because they are unsupported by affidavits.³² Caribbean further indicates that the Commission may only revoke a station's license through procedures set forth in Section 312 of the Communications Act, as amended.³³ Caribbean also argues that the exhibit photographs that GWC filed in support of its claim do not portray Caribbean's facilities accurately.³⁴ Moreover, Caribbean asserts that it has complied with the Commission's Rules in good faith, and that while Caribbean is in the process of amassing the channels necessary for its wireless cable system, Station WNTK992 has been on the air since construction, save for reported periods.³⁵

7. In reply to Caribbean, GWC asserts that affidavits were not required. As its petition was properly executed and filed, GWC maintains, it is worthy of Commission consideration.³⁶ GWC further maintains that a revocation proceeding was not required under the conditions of the instant case given that the Commission's Rules and case law expressly allow cancellation without such a hearing.³⁷ GWC notes that Caribbean acknowledges that Station WNTK992 is not operating, and contends that Caribbean's provision merely of "other services" consisting of test signals to one subscriber, the provision of which Caribbean's filings and annual reports acknowledge, does not constitute operation of a station sufficient to avoid cancellation of its license.³⁸

8. In support of its petition to deny Caribbean's application for a license modification,³⁹ GWC indicates that grant of the application could prejudice the Commission's consideration of GWC's Forfeiture Motion directed at Station WNTK992.⁴⁰ In opposition, Caribbean maintains that GWC lacks standing to file the petition, and indicates that a station license may only be revoked in accordance with revocation procedures pursuant to Section 312 of the Communications Act, as amended.⁴¹ In reply, GWC notes that the Commission encourages the holders of BTA authorizations to find and document instances in which incumbent licensee rights should be revoked or terminated as a result of a licensee's conduct or

³⁰ Motion for Forfeiture at 5-6

³¹ Motion for Forfeiture at 4. 47 C.F. R. § 21.303(d) requires that a licensee submit a station license for cancellation after a period of twelve months of discontinued service.

³² Opposition to Motion to Cancel or Declare Forfeiture of License (filed May 20, 1997) at 2.

³³ *Id.* at 2-3, *citing* 47 U.S.C. § 312.

³⁴ *Id.* at 5-6, Exhibit A.

³⁵ *Id.* at 6-8.

³⁶ Reply to Opposition to Motion to Cancel or Declare Forfeiture of License (filed June 2, 1997) at 2-3, *citing Warren Ache*, 9 FCC Rcd 2646 and its interpretation of 47 C.F.R. § 21.303(d) as allowing license cancellation without a revocation hearing.

³⁷ *Id.* at 4-5.

³⁸ *Id.* at 5-7.

³⁹ Petition to Deny (filed Oct. 24, 1997).

⁴⁰ *Id.* at 3.

⁴¹ Opposition to Petitions to Deny (filed Nov. 26, 1997) at 2-3.

lack of compliance with Commission rules and regulations.⁴² GWC states that it has standing to do so in this case in its capacity as the Mayaguez, Puerto Rico BTA authorization holder, and indicates that revocation procedures are unnecessary if a license is canceled automatically or otherwise required to be “turn[ed] in” to the Commission.⁴³

9. In its petition to deny GWC’s station applications,⁴⁴ Caribbean argues that these applications are defective because they do not include interference studies with respect to Caribbean’s Station WNTK992.⁴⁵ Caribbean further contends that because this failure appears to be deliberate on GWC’s part, the Commission should impose sanctions on GWC.⁴⁶ In opposition to Caribbean, GWC argues that because Caribbean’s license for Station WNTK992 had been forfeited automatically, as demonstrated by GWC, interference to that license need not have been considered.⁴⁷ In reply, Caribbean argues that absent actual forfeiture of Station WNTK992’s license, the station must be protected from interference and proper studies filed with the Commission.⁴⁸

10. Based on the record before us, we conclude that we need not address whether Caribbean’s license forfeited automatically pursuant to Section 21.44(a)(3) of the Commission’s Rules,⁴⁹ as GWC alleges.⁵⁰ Rather, we find that this issue need not be addressed since the record clearly establishes that Caribbean permanently discontinued operation of Station WNTK992.⁵¹ As a result, pursuant to Section 21.303(d) of the Commission’s Rules, the circumstances presented require a determination of cancellation of the license for Station WNTK992.⁵² Section 21.303(d) states, in pertinent part:

If any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed . . . the licensee shall, within thirty days of the end of such period of nonuse: (1) Submit for cancellation the station license . . . (2) File an application for modification of the license (or licenses) to delete the unused frequency (or frequencies), or (3) Request waiver of this rule and demonstrate either that the frequency will be used . . . within six months of the end of the initial period of nonuse, or that the frequency will be converted to allow

⁴² Reply (filed Dec. 9, 1997) at 2, citing *Report and Order* in MM Docket No. 94-131 and PP Docket No. 93-253, 10 FCC Rcd 9589, 9612-13 (1995).

⁴³ Reply (filed Dec. 9, 1997) at 2-3.

⁴⁴ Petition to Dismiss or Deny (filed Sept. 17, 1998) involves File Nos. BMDP-980721ND, BMDP-980721NE, and BMDP-980721NF (filed July 21, 1998).

⁴⁵ Petition to Dismiss or Deny (filed Sept. 17, 1998) at 2-3.

⁴⁶ *Id.* at 3-4.

⁴⁷ Opposition to Petition to Dismiss or Deny (filed Sept. 30, 1998) at 2-3.

⁴⁸ Reply to Opposition to Petition to Dismiss or Deny (filed Oct. 10, 1998) at 2-3.

⁴⁹ 47 C.F.R. § 21.44(a)(3).

⁵⁰ See para. 5, *supra*.

⁵¹ See Caribbean Opposition at 9; Caribbean MMDS Partnership Annual Reports for Calendar Years 1994 through 1999 (filed Mar. 1, 1995; Mar. 1, 1996; Mar. 12, 1997; Mar. 2, 1998; Mar. 1, 1999; Apr. 18, 2000).

⁵² 47 C.F.R. § 21.303(d).

rendition of other authorized public services within one year of the end of the initial period of nonuse⁵³

Caribbean admits that Station WNTK992 has been used only to transmit “various test signals.”⁵⁴ Annual reports of Caribbean,⁵⁵ admissions in this proceeding,⁵⁶ and other filings⁵⁷ establish that Caribbean has not used Station WNTK992 to provide “service” since the station was constructed. Section 21.303(d) was designed to ensure that “a carrier who has a license, but is unable to use it . . . relinquish[es] the frequencies to others who may be able to use the spectrum.”⁵⁸ This rule requires a licensee to provide service.⁵⁹ Therefore, we find that, under the circumstances of this case,⁶⁰ pursuant to Section 21.303(d) of the Commission’s Rules,⁶¹ the license for Station WNTK992 is cancelled with an effective date of December 22, 1994, one year after Caribbean indicates that station construction was completed.⁶² Because Section 21.303(d) specifically discusses the circumstances resulting in cancellation and does not enunciate a revocation hearing requirement, contrary to Caribbean’s argument, we find that no such hearing is required in this context.⁶³

11. Further, with December 24, 1994 as the operative date for cancellation, we find that Caribbean’s request for a waiver of Section 21.303(d) with respect to its admitted non-operation of Station WNTK992 in 1998 and 1999, is moot, having been filed after this date. As a result, we dismiss such request on such basis.

12. In light of our finding that the license for Station WNTK992 cancelled, we will dismiss as moot Caribbean’s application to modify that station,⁶⁴ GWC’s petition to deny that application,⁶⁵ and

⁵³ *Id.*

⁵⁴ Caribbean Opposition at 9.

⁵⁵ Caribbean MMDS Partnership Annual Reports for Calendar Years 1994 through 1999 (filed Mar. 1, 1995; Mar. 1, 1996; Mar. 12, 1997; Mar. 2, 1998; Mar. 1, 1999; Apr. 18, 2000).

⁵⁶ Caribbean Opposition at 8-9.

⁵⁷ See, e.g., Notification of Involuntary Discontinuance of Service (filed Mar. 13, 1997), Notice of Involuntary Temporary Discontinuance of Service (filed Oct. 2, 1998). Though Caribbean estimated in this latter notice that it would not be providing service for approximately two months, Caribbean actually provided no service for at least a full year. See Caribbean MMDS Partnership Annual Report for Calendar Year 1999, *supra*.

⁵⁸ See Revision of Part 21 of the Commission's Rules, CC Docket No. 86-128, *Report and Order*, 2 FCC Rcd 5713, 5724 ¶ 81 (1987).

⁵⁹ See San Diego MDS Company, *Order on Reconsideration*, DA 03-3619 (rel. Nov. 13, 2003); *Warren Ache*, 9 FCC Rcd 2464, 2466 (1993).

⁶⁰ Here, within thirty days of December 22, 1994, Caribbean filed no application for modification of the license or request for waiver of 47 C.F.R. § 21.303.

⁶¹ 47 C.F.R. § 21.303(d).

⁶² We note that Caribbean failed in its obligation to submit its license for cancellation pursuant to 47 C.F.R. § 21.303(d). Any alternative reading of the rule that would require the submission of the license as a condition precedent to cancellation would be an unreasonable reading, as it would frustrate the underlying purpose of the rule. The rule was adopted to ensure the efficient use of the spectrum by requiring the cancellation of used licenses. See Revision of Part 21 of the Commission’s Rules, *Report and Order*, 2 FCC Rcd 5713, 5724 ¶ 82 (1987).

⁶³ See *Warren Ache*, 9 FCC Rcd 2464 (1993).

⁶⁴ See File No. 50870-CM-P-97.

⁶⁵ Petition to Deny (filed Oct. 24, 1997).

Caribbean's application to renew that license.⁶⁶ With respect to Caribbean's petition to deny GWC's applications,⁶⁷ we dismiss Caribbean's petition for lack of standing. As Caribbean's license for Station WNTK992 has cancelled, Caribbean can suffer no potential harm or injury from a grant of GWC's applications. Within this context, Caribbean cannot be said to be a party-in-interest and, therefore, lacks standing.⁶⁸

CONCLUSION AND ORDERING CLAUSES

13. For the reasons stated above, we conclude that Caribbean's Station WNTK992 license cancelled due to Caribbean's failure to use that license to provide service. In light of our conclusion, we will dismiss Caribbean's application to modify the license for Station WNTK992,⁶⁹ as well as the petition to deny that application filed by GWC.⁷⁰ We also will dismiss Caribbean's application for renewal of Station WNTK992,⁷¹ and we will dismiss Caribbean's petition to dismiss or deny that was filed against GWC's applications.⁷²

14. Accordingly IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 21.303 of the Commission's Rules, 47 C.F.R. § 21.303, the Motion to Cancel or Declare Forfeiture of License filed by Grand Wireless Company on May 5, 1997 IS GRANTED.

15. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and Section 21.303 of the Commission's Rules, 47 C.F.R. §§ 21.303, that the license for Station WNTK992 IS DEEMED CANCELED as of December 24, 1994.

16. IT IS FURTHER ORDERED that the application for modification of license filed by Caribbean MMDS Partnership on August 21, 1997 (File No. 50870-CM-P-97), the Petition to Deny filed by Grand Wireless Company on October 24, 1997, the Petition to Dismiss or Deny filed by Caribbean MMDS Partnership on September 17, 1998, and the application for renewal filed by Caribbean MMDS Partnership on April 30, 2001 (File No. BRMD-20010430AAA) ARE DISMISSED.

⁶⁶ File No. BRMD-20010430AAA.

⁶⁷ Petition to Dismiss or Deny (filed Sep. 17, 1998).

⁶⁸ See 47 U.S.C. § 309(d)(1) and 47 C.F.R. § 21.30(a)(3); see also *Sierra Club v. Morton*, 405 U. S. 727, 733 (1972); *National Broadcasting Co.*, 37 FCC 2d 897, 898 (1972); Lawrence N. Brandt and Krisar, Inc., *Memorandum Opinion and Order*, 3 FCC Rcd 4082 (CCB Dom Fac. Div. 1998) (party-in-interest status is deemed to exist when a petitioner demonstrates that the grant of the petitioned application will cause the petitioner a direct injury).

⁶⁹ See File No. 50870-CM-P-97.

⁷⁰ Petition to Deny (filed Oct. 24, 1997).

⁷¹ File No. BRMD-20010430AAA.

⁷² Petition to Dismiss or Deny (filed Sep. 17, 1998).

17. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 21.32 of the Commission's Rules, 47 C.F.R. § 21.32, that the Division's Licensing and Technical Analysis Branch SHALL PROCESS Application File Nos. BMDP-19980721ND, BMDP-19980721NE, and BMDP-19980721NF consistent with the applicable Commission policies, rules, and regulations.

18. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau